An Analysis of Selective Service System v. Minnesota Public Interest Research Group

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An Analysis of Selective Service System v. Minnesota Public Interest Research Group

Section 1113 of the Department of Defense Authorization Act passed in 1982 prohibits the receipt of Title IV educational funds by students who do not comply with draft registration requirements. In Selective Service System v. Minnesota Public Interest Research Group, the United States Supreme Court upheld section 1113 in the face of a multi-tiered constitutional challenge. After exploring the history of section 1113, the author examines the Supreme Court’s analysis of each of the constitutional challenges: bill of attainder, privilege against self-incrimination, and equal protection. Finally, the author investigates the probable impact of the Court’s decision.

I. INTRODUCTION

In response to the 1980 Soviet invasion of Afghanistan, which perpetuated a growing apprehension of the Soviet Union’s military strength, President Carter reinstituted mandatory draft registration. As a result, young men born after 1960 must register for the draft within thirty days of their eighteenth birthday, or face possible criminal charges. The majority of these young men have complied with the registration requirement; however, many have failed to do so.

A variety of explanations may account for such widespread non-compliance. Inevitably there are those who have willfully failed to register for the draft due to religious or moral convictions. However, many nonregistrants may be unaware of the registration requirement. Still others, although aware of the registration requirement, may not comprehend the importance of compliance.

Pursuant to Selective Service System v. Minnesota Public Interest Research Group, innocent as well as willful nonregistrants are precluded from receiving Title IV educational financial aid. In this decision, the Supreme Court upheld section 1113 of the Department of Defense Authorization Act.

Defense Authorization Act, which restricts student financial aid based on compliance with the draft registration requirement. The Court, in an opinion authored by Chief Justice Burger, held that section 1113 is not an unconstitutional bill of attainder, that it does not violate the fifth amendment privilege against self-incrimination, and that it does not violate the fifth amendment right to equal protection under the law.

After examining the historical development of bills of attainder, fifth amendment self-incrimination, and equal protection, this note will analyze the Selective Service System decision. The opinion of the Court will be summarized, along with its projected impact on individuals and future legislation.

II. HISTORICAL BACKGROUND

A. Section 1113

The United States Constitution provides that "Congress shall have Power To . . . raise and support Armies . . . ." Congress is also empowered "To make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested [in Congress] by this Constitution . . . ." Pursuant to this authority, Congress passed legislation empowering the President to require by proclamation the registration of both male citizens and male resident aliens between the ages of eighteen and twenty-six. President Ford discontinued registration on March 29, 1975, but President Carter reinstated it on July 2, 1980 in response to the Soviet invasion of Afghanistan.

Section 1113 was introduced by Representative Gerald Solomon on July 28, 1982 during the House debate on Defense Department spending for 1983. A similar amendment had been introduced to

7. For a discussion of bills of attainder, see infra notes 36-46 and accompanying text.
8. For a discussion of fifth amendment self-incrimination, see infra notes 59-74 and accompanying text.
9. For a discussion of fifth amendment equal protection, see infra notes 75-88 and accompanying text.
15. Representative Solomon is a Republican from New York.
the Senate on May 12, 1982 by Senators Mack Mattingly and S.I. Hayakawa. After a vigorous debate, the amendment passed by an overwhelming bipartisan majority in each house.

The Department of Education issued final regulations governing section 1113 on April 11, 1983. The regulations require a male student applying for Title IV aid to certify, in a statement of registration compliance, that he is either registered with the Selective Service or that, for a specified reason, he is not required to register. Female students are required to complete an identical statement but are exempt from registration. A student who purposefully falsifies his statement of registration compliance is subject to a fine or imprisonment, or both.

Beginning on July 1, 1985, there will be an additional requirement necessary to fulfill the mandate of section 1113. First, the student must file the statement of registration compliance previously required. Second, the student must submit documentation to the educational institution he is planning to attend verifying that he has registered with the Selective Service. If a student fails to meet these requirements, he must be given written notice that he has been denied Title IV assistance due to failure to comply with the Act. A student who has been so notified, and who has not registered, may do so within thirty days of receiving the notice or before the end of the educational payment period. He may then file a statement of com-

17. Senator Mattingly is a Republican from Georgia.
18. 128 CONG. REC. S4943 (daily ed. May 12, 1982). Senator Hayakawa is a Republican from California.
19. For a complete record of the congressional debates, see 128 CONG. REC. S4942-45 (daily ed. May 12, 1982); 128 CONG. REC. H4756-72 (daily ed. July 28, 1982).
21. 34 C.F.R. § 668.24 (1984). Specified reasons excusing registration include being in the armed services on active duty, not having reached the age of eighteen, being born before 1960, or being a permanent resident of the Trust Territory of the Pacific Islands or the Northern Mariana Islands. Id. § 668.25.
22. See id. § 668.25.
23. Id.; see also 50 U.S.C. app. § 462(a) (1982).
25. Appropriate documentation to be used to verify registration compliance includes a copy of the student’s registration acknowledgement letter, a financial aid transcript prepared pursuant to section 668.14 including the student’s selective service number, or other documentation from the Selective Service approved by both the Secretary and Director of the Selective Service System. 34 C.F.R. § 668.26 (1984). A student temporarily verifying his registration by submitting an affidavit must submit documentation within one hundred and twenty days from the date of the affidavit. Id.
pliance to establish his eligibility for assistance.\textsuperscript{27} Finally, a student who has been denied benefits may request a hearing to determine compliance with section 1113.\textsuperscript{28}

Section 1113 has created considerable controversy among political figures. Representative Solomon, the amendment's strongest proponent, stated: "If young men want the privilege of getting low-cost, taxpayer funded college loans, then they damn well ought to live up to their duty to obey the law."\textsuperscript{29} The amendment has also met with strong opposition. During the House debate, Representative Edgar criticized the bill by stating: "This amendment has the obvious primary objective of increasing the number of men registered. . . . However, it also has a secondary, and more subtle, objective, which is to punish those individuals who do not register."\textsuperscript{30} Representative Patterson agreed with Representative Edgar, stating the amendment to be both punitive and an administrative burden.\textsuperscript{31}

Several public interest groups also became involved in the controversy. College administrators joined the opposition, claiming that the law represented increased administrative burdens as well as unwarranted governmental intrusion.\textsuperscript{32} Additionally, various religious institutions joined the colleges in an attempt to support those students whose federal loan applications had been denied.\textsuperscript{33} This controversy led to the filing of a suit by the Minnesota Public Interest Group in 1982,\textsuperscript{34} and to the final Supreme Court decision on July 5, 1984.\textsuperscript{35}

A variety of commonly discussed issues may arise in determining the constitutionality of section 1113. The Supreme Court considered

\begin{itemize}
\item \textsuperscript{27} 34 C.F.R. § 668.27 (1984).
\item \textsuperscript{28} Id. A student is entitled to a hearing only if he is in compliance with registration requirements and has filed a written request for a hearing within the award year for which he was denied Title IV assistance, or within thirty days following the end of the payment period. At the hearing, the student bears the burden of proving compliance with the requirements of the Military Selective Service Act. The hearing is limited to determination of compliance with section 1113. The hearing officer may not consider challenges, constitutional or otherwise, to the requirements that a student must verify compliance with the registration act. Id.
\item \textsuperscript{30} 128 CONG. REC. H4760 (daily ed. July 28, 1982).
\item \textsuperscript{31} Representative Patterson stated: "Not only is it highly discriminatory in nature and would require significant expenditures of time and money, but it is entirely unnecessary . . . . We already have a law on the books for punishing those who fail to register for the draft . . . ." Id.
\item Failure to register within thirty days of one's eighteenth birthday is a felony, punishable by imprisonment for up to five years and/or a fine of up to $10,000.00. 50 U.S.C. app. § 462(a) (1982).
\item \textsuperscript{32} N.Y. Times, July 19, 1983, at C1, col. 1.
\item \textsuperscript{33} Id.
\item \textsuperscript{35} Selective Serv. Sys., 104 S. Ct. at 3348.
\end{itemize}
three issues in *Selective Service System*. The first issue concerned whether section 1113 constitutes a bill of attainder because it states that those who fail to register as required by the Military Selective Service Act are ineligible for Title IV assistance. The second issue inquired whether section 1113 violates the fifth amendment privilege against self-incrimination by compelling those who wish Title IV assistance, and who are required to register, to file a statement of registration compliance with their colleges. Finally, the third issue examined whether section 1113 denies equal protection under the fifth amendment by enforcing the registration requirements of the Military Selective Service Act only against those nonregistrants who are in need of financial assistance.

**B. Bill of Attainder**

In determining the constitutionality of section 1113, the Supreme Court discussed whether the statute constitutes a bill of attainder. Therefore, an analysis of bills of attainder is needed to understand the Court's decision.

1. **Origin of bill of attainder**

A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual [or group of individuals] without provision of the protections of a judicial trial."\(^{36}\) It is believed to have originated in common law England during the fourteenth or fifteenth century.\(^{37}\) Traditionally, it consisted of legislation enacted by Parliament and the punishment inflicted was the condemning to death of a specified group.\(^{38}\) Such legislation was most often employed as a means by which to punish political activity deemed threatening or treasonous.\(^{39}\) Parliamentary acts inflicting a less severe form of punishment were called bills of pains and

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37. Lehmann, *The Bill of Attainder Doctrine: A Survey of the Decisional Law*, 5 HASTINGS CONST. L.Q. 767, 772 (1978). The exact origins of bills of attainder are unclear; however, the first Parliamentary Act known to have possessed the traditional attributes of attainder was passed in 1392. *Id.*
Bills of attainder were prevalent in the United States during the post-Revolutionary War period. Many states enacted legislation aimed at punishing those considered to have been loyalists during the war. Thus, the framers were wary of these bills of attainder as they convened to draft the Constitution in 1787. In a conscious effort to prohibit such legislation, they provided in the Constitution that Congress shall pass "[n]o Bill of Attainder or ex post facto Law" and that "[n]o State shall . . . pass any Bill of Attainder, [or] ex post facto . . . Law, or Law impairing the Obligation of Contracts . . . ." The framers intended that the power to try, convict and then punish was to be a judicial power that the legislative branch was forbidden to exercise.

A bill of attainder is modernly identified by four characteristics: it is (1) a legislative act (2) which imposes punishment (3) upon a designated person or class of persons (4) without benefit of a judicial trial. The Supreme Court's analysis of bills of attainder has not been consistent. An overview of the landmark decisions is necessary to understand the decision in Selective Service System.

2. Case development

The Supreme Court was first confronted with the bill of attainder doctrine shortly after the Civil War. During this period, both the federal and state governments passed laws compelling certain classes of individuals to take expurgatory oaths disavowing past actions of disloyalty to the United States, or be denied the right to enter certain

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41. See Thompson, Anti-Loyalist Legislation During the American Revolution, 3 Nw. U.L. Rev. 81 (1908-09).
42. U.S. Const. art. I, § 9, cl. 3. An ex post facto law is one which is "passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed." Black's Law Dictionary 520 (5th ed. 1979).
44. Lehmann, supra note 37, at 778-79. Two theories have been advanced to justify prohibiting bills of attainder. The first is the doctrine of separation of powers. The Constitution, as set forth in the first three articles, intended for the three branches of government, executive, legislative, and judicial, to have independent powers. The judiciary was to have the sole authority to try and convict. The legislature, in enacting bills of attainder, encroaches on the authority expressly delegated to the judiciary under the Constitution. The second theory is based on the concept of procedural due process. The Constitution expressly guarantees each United States citizen the right to counsel in a criminal proceeding, the right to confront and cross-examine adverse witnesses, and the right to have an impartial jury. Legislative trials offer none of these safeguards.
45. Id. at 790-91. This definition was first espoused by the Court in United States v. Lovett, 328 U.S. 303, 315 (1946), and has provided a convenient means by which to analyze such legislation.
46. 104 S. Ct. at 3345.
specified vocations. These laws were struck down on the ground that they were punitive rather than regulatory, as they were passed to punish the person, not to regulate the profession.

During the 1940's and 1950's, the Court addressed bill of attainder challenges directed at state laws passed in response to the communist crisis. One law was struck down which denied government appropriations to pay the salaries of government employees accused of being communist subversives. The law was clearly designed to punish named individuals without the benefit of a judicial trial. However, during the McCarthy era, the Court deviated from its traditional analysis to uphold statutes designed to curb subversive activities of individuals labeled as communists. These statutes were held to be constitutional, as they were intended to alter future conduct, rather than to punish past behavior.

The Supreme Court, during the 1960's, applied the bill of attainder doctrine in a more liberal fashion. A law was invalidated which made it a crime to serve as an officer of a labor union, during or within five years of one's membership in the Communist Party. The doctrine was viewed as a general safeguard against “trial by leg-


In Cummings, the target of a state law was an ordained Roman Catholic priest who was convicted for teaching and preaching after refusing to take the loyalty oath required by the Missouri Constitution. He was sentenced to pay a fine of $500.00 and was to be jailed until that fine was paid. 71 U.S. (4 Wall.) at 281-82.

In Garland, the target of a federal statute was a lawyer who refused to take an oath of loyalty to the United States. He was thereafter denied admittance to practice as an attorney before any federal court. 77 U.S. (4 Wall.) at 334-38.


50. Id. at 316.

51. See Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1960) (statute requiring all communist action organizations to register with the Attorney General); American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (statute conditioning recognition of a labor organization on the filing of affidavits by its officers stating that they did not belong to the communist party and did not believe in overthrowing the government).

52. Communist Party, 367 U.S. at 87; Douds, 339 U.S. at 413-14.

53. United States v. Brown, 381 U.S. 437 (1965). Section 504 of the Labor Management Reporting and Disclosure Act of 1959 was enacted to replace section 9(h) of the National Labor Relations Act, which the Supreme Court upheld in Douds, 339 U.S. at 382. Brown, 381 U.S. at 438-39. In Brown, however, the Court found that section 504 isolated a sufficiently specified group—the Communist Party. Id. at 451-52. The Court also found that section 504 inflicted inescapable punishment on that specific group by disqualifying past members of the party from serving as labor union officers. Id. at 458.
islature” rather than as the narrow, technical legislative prohibition seen during the 1950’s.54

The most recent bill of attainder decision,55 although heavily criticized,56 was relied on extensively by the Court in Selective Service System. A federal statute requiring the General Services Administration to take custody of former President Nixon’s presidential papers and tape recordings was held not to be a bill of attainder.57 The statute was viewed as a nonpunitive regulatory function, as it was effected to “preserv[e] the availability of judicial evidence and . . . historically relevant materials.”58

This twisted path of decisions followed by the Supreme Court finally led to Selective Service System, where the Court once again upheld a federal statute against a bill of attainder challenge.

C. Fifth Amendment: Self-Incrimination

The second major issue of importance to the Supreme Court in Selective Service System was whether section 1113 violates the fifth amendment privilege against self-incrimination. The fifth amendment to the United States Constitution provides, in part, that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”59 Essentially, the principal purpose of the amendment is to protect the individual from being coerced by the government to reveal self-incriminating information.60 Thus, an analysis of

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54. Brown, 381 U.S. at 442.
58. Id. at 478-79.
59. U.S. CONST. amend. V.
60. The policy underlying the privilege against self-incrimination was most comprehensively explained by Justice Goldberg in Murphy v. Waterfront Comm’n, 378 U.S. 52 (1964):

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates “a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;” . . . our respect for the inviolability of the human personality and of the right of each individual “to a private enclave where he may lead a private life;” . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes “a shelter to the guilty,” is often “a protection to the innocent.”

Id. at 55.
the Court's modern approach to the fifth amendment illustrates two central issues which commonly arise: (1) whether some form of government coercion exists, and (2) whether the coerced disclosure presents a real and substantial threat of incrimination.

The strict language of the amendment seems to imply that government coercion is forbidden only in the context of criminal trials. However, the phrase, "in any criminal case," has been extended to certain other areas such as grand jury proceedings, police custodial interrogations, civil proceedings, investigation by administrative officials, and legislative committee hearings. Indeed, the "privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory."

In addition to being involved in a proceeding in which the Court will recognize government coercion, an individual must be compelled to offer evidence which is testimonial or communicative in nature. Not only does the privilege extend to information that is in itself incriminatory, but also to information that might possibly lead to other evidence likely to be incriminatory.

The Court has, in recent years, recognized a new category of governmental coercion which operates against an individual's economic interest. Governmental compulsion has been held impermissible

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61. Lefkowitz v. Turley, 414 U.S. 70 (1973) (New York statute which precluded award of government contract to any person who failed to waive immunity when called to testify before a grand jury concerning the contract held unconstitutional).
62. Miranda v. Arizona, 384 U.S. 436 (1966) (prosecution may not use statements, either exculpatory or inculpatory, stemming from a custodial interrogation, unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination).
63. Lefkowitz v. Cunningham, 431 U.S. 801 (1977) (New York statute under which an attorney was divested of his state political office for refusing to waive his fifth amendment privilege in a civil proceeding held unconstitutional).
65. Quinn v. United States, 349 U.S. 155 (1955) (defendant's references to fifth amendment privilege was sufficient to invoke the privilege against self-incrimination in a congressional hearing).
66. Murphy, 378 U.S. at 94.
68. Murphy, 378 U.S. at 94 (the privilege "protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used"); Hoffman v. United States, 341 U.S. 479, 486-87 (1951) ("The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant . . . ").
69. Turley, 414 U.S. at 70 (New York statutes which require government contrac-
where the government has imposed some sanction making an individual's exercise of his fifth amendment privilege costly. As Justice Douglas stated, "[w]here the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other." Such government compulsion is constitutionally impermissible.

The second issue arising under the fifth amendment concerns the threat of incrimination. The privilege against compelled self-incrimination does not protect an individual from all government compelled disclosures. The privilege is effective only if the individual faces a "real and appreciable" danger of self-incrimination. In other words, an imagined or insubstantial threat of self-incrimination "having reference to some extraordinary and barely possible contingency" is not protected by the fifth amendment.

D. Fifth Amendment: Equal Protection

The third issue discussed by the Supreme Court in Selective Service System was whether section 1113 violates equal protection under the fifth amendment. Equal protection generally guarantees that all citizens will be treated equally under the law. Both state and federal governments are restricted by this guarantee; however, the basis for each of these restrictions rests on entirely distinct grounds. Although the fourteenth amendment commands that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws," the Constitution contains no such express prohibition concerning the federal government. Instead, the federal prohibition is derived from the theory that a governmental classification, which operates to deny any person equal protection under law,

70. Griffin v. California, 380 U.S. 609 (1965) (a trial court or prosecutor commenting on defendant's failure to testify is a violation of fifth amendment privilege).
72. See Kastigar v. United States, 406 U.S. 441, 443 (1972) ("[t]he power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence"). Additionally, the power to subpoena and confront witnesses is embodied in the Constitution. U.S. CONST. amend. VI.
74. Id.
75. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 517 (2d ed. 1983) [hereinafter cited as CONSTITUTIONAL LAW].
76. U.S. CONST. amend. XIV, § 1 (emphasis added).
is violative of the due process clause of the fifth amendment. As the issue arising under section 1113 of the Selective Service Act is one that concerns federal government legislation, this note will outline the historical evolution of fifth amendment equal protection.

The absence of an express guarantee of equal protection binding the federal government is attributed to the framers of the fourteenth amendment. The framers, in drafting the amendment, intended to empower Congress with the ability to impose restrictions on racial discrimination within the states. It never occurred to the framers to impose such a restriction on Congress itself. It was not until the 1950's that the Supreme Court compensated for the framers' oversight and expanded the scope of the fifth amendment to encompass equal protection concerns.

The Supreme Court has since expanded fifth amendment equal protection to the extent that such claims are treated precisely the same as those arising under the fourteenth amendment. In fact, the treatment is so similar that fourteenth amendment decisions have repeatedly served as precedent for cases arising under the fifth amendment. Thus, "if a [discriminatory] classification would be invalid under the Equal Protection Clause of the Fourteenth Amend-

79. Id. at 541-42.
80. Bolling, 347 U.S. at 497. In Bolling, the Supreme Court held that racial "segregation in public education is not reasonably related to [a] proper governmental objective." Thus, such racial discrimination violated the plaintiff's fifth amendment due process rights based on equal protection. Id. at 500.
81. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975). See Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975) (although the fifth amendment does not contain an express equal protection guarantee as does the fourteenth amendment, due process does prohibit the federal government from engaging in discrimination which is necessarily violative of due process); Bolling, 347 U.S. at 499 ("[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.").
82. See generally Karst, supra note 78, at 554.

In Frontiero v. Richardson, 411 U.S. 677 (1977), the Court held statutes providing "that spouses of male members of the uniformed services are dependents for purposes of [receiving various] benefits [while] spouses of female members are not dependents unless they are in fact dependent for over one-half of their support" as violative of the fifth amendment. Id. at 677. In so holding, eight Justices agreed that Reed v. Reed, 404 U.S. 71 (1971), a fourteenth amendment equal protection decision, was a controlling precedent.

ment, it is also inconsistent with the due process requirement of the Fifth Amendment." 83

The Supreme Court's approach to governmental discriminatory classification involves three standards of review. 84 The first level of review is termed the "strict scrutiny" test, utilized when the classification infringes on a fundamental constitutional right. 85 The second level of review is termed the "rational relationship" test, which applies to general economic and welfare legislation. 86 The third standard falls between the first and second levels and is generally referred to as the "middle-tier" test. 87 The Court has utilized middle-tier analysis when it wishes to afford less deference to legislative judgments not involving fundamental rights. 88

III. THE PROBLEM

On November 23, 1982, the Minnesota Public Interest Research Group, 89 a college student-directed nonprofit corporation, brought an action in the United States District Court 90 seeking to enjoin the operation of section 1113 of the Department of Defense Authorization

84. See generally CONSTITUTIONAL LAW, supra note 75, at 590-600.
85. In contrast to economic and social regulatory action, state action that discriminates against suspect classifications or impinges the exercise of a fundamental right will violate equal protection unless necessary to accomplish a compelling state interest. Cases delineating fundamental rights include: Roe v. Wade, 410 U.S. 113 (1973) (right of a uniquely private nature); Bullock v. Carter, 405 U.S. 134 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right of interstate travel); Williams v. Rhodes, 393 U.S. 23 (1968) (rights guaranteed by the first amendment); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate). Suspect classes have been found in the following cases: Graham v. Richardson, 403 U.S. 365 (1971) (alienage); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Oyama v. California, 332 U.S. 633 (1948) (ancestry).
86. The rational relationship test is traditionally stated as whether the governmental classification is "rationally related to furthering a legitimate state interest." Vance v. Bradley, 440 U.S. 93, 97 (1979). Further, "equal protection analysis requires strict scrutiny [analysis] only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976).
87. The concept of middle-tier analysis was identified by Professor Gunther in a landmark article, Gunther, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection, 86 HARV. L. REV. 1 (1972).
88. The middle tier was formally adopted in gender-based classification cases and stated as whether the government can demonstrate that the classification is "substantially related to achievement of [important governmental] objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). Further, the Court has informally adopted this standard in other types of classifications. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982) (education of illegal alien's minors); Lalli v. Lalli, 439 U.S. 259 (1978) (legitimacy classifications).
89. Hereinafter referred to as Public Interest Group.
Act of 1983.\textsuperscript{91} Section 1113 requires draft-age males who desire any form of assistance or benefit provided under Title IV of the Higher Education Act of 1965\textsuperscript{92} to comply with the registration requirements of section 3 of the Military Selective Service Act.\textsuperscript{93} Not only must draft-age males comply with the requirements of the Act, but a statement of compliance must be filed with any educational institution which is or may be attended by such male. Failure to do so results in the forfeiture of Title IV assistance.\textsuperscript{94} The district court dismissed the Public Interest Group for lack of standing\textsuperscript{95} but allowed three anonymous students to intervene as plaintiffs.\textsuperscript{96}


The full text of section 1113, also referred to as the Solomon Amendment, is as follows:

(f) (1) Any person who is required under section 3 to present himself for and submit to registration under such section and fails to do so in accordance with any proclamation issued under such section, or in accordance with any rule or regulation issued under such section, shall be ineligible for any form of assistance or benefit provided under title IV of the Higher Education Act of 1965.

(2) In order to receive any grant, loan, or work assistance under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.), a person who is required under section 3 to present himself for and submit to registration under such section shall file with the institution of higher education which the person intends to attend, or is attending, a statement of compliance with section 3 and regulations issued thereunder.

(3) The Secretary of Education, in agreement with the Director, shall prescribe methods for verifying such statements of compliance filed pursuant to paragraph (2). Such methods may include requiring institutions of higher education to provide a list to the Secretary of Education or to the Director of persons who have submitted such statements of compliance.

(4) The Secretary of Education, in consultation with the Director, shall issue regulations to implement the requirements of this subsection. Such regulations shall provide that any person to whom the Secretary of Education proposes to deny assistance or benefits under title IV for failure to meet the registration requirements of section 3 and regulations issued thereunder shall be given notice of the proposed denial and shall have a suitable period (of not less than 30 days) after such notice to provide the Secretary with information and materials establishing that he has complied with the registration requirement under section 3. Such regulations shall also provide that the Secretary may afford such person an opportunity for a hearing to establish his compliance or for any other purpose.


\textsuperscript{93} Section 3 of the Military Selective Service Act, 50 U.S.C. app. § 453 (1982), requires every male citizen and every male resident alien residing in the United States between the ages of eighteen and twenty-six to register for the draft as determined by proclamation of the President. Section 12 of the Act imposes criminal penalties for willful failure to comply with the Act.


\textsuperscript{95} \textit{Selective Serv. Sys.}, 557 F. Supp. at 925.

\textsuperscript{96} \textit{Id.} The three anonymous students, Joe Doe, Richard Roe and Paul Poe [here-
The district court denied plaintiffs' motion for a temporary restraining order, but granted a preliminary injunction prohibiting the government from enforcing section 1113. The court limited the preliminary injunction to enforcement only, allowing the government to promulgate new regulations governing section 1113 pending final determination of the constitutionality of that section.

On July 5, 1984, the United States Supreme Court reversed the judgment of the district court. The preliminary injunction granted by the district court was dissolved, thereby enabling the government to enforce section 1113.

IV. MAJORITY OPINION

A. Section 1113 Determined to be Constitutional Legislation

The central issue in Selective Service System was whether section 1113 of the Department of Defense Authorization Act of 1983 was an unconstitutional bill of attainder. Chief Justice Burger, delivering the opinion of the Court, stated that the government was comprised of the following: Selective Service System; Major-General Thomas Turnage, Director of the Selective Service System; United States Department of Education; and Terrel H. Bell, Secretary of the United States Department of Education [hereinafter referred to as the government].

Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on the other parties litigant; (3) the probability that the movant will succeed on the merits; and (4) the public interest.

In Doe, the court made the following findings: first, plaintiffs faced irreparable injury in that they would be denied financial assistance necessary to complete their educations; second, the threat of irreparable harm outweighed any potential injury to defendants and the plaintiffs established a probability of success on the merits; third, the plaintiffs would probably succeed in showing that section 1113 constitutes a bill of attainder and that it violated plaintiffs' fifth amendment right against compelled self-incrimination; and, fourth, the public interest favored the issuance of a preliminary injunction.

100. See supra notes 20-28 and accompanying text.


103. See supra note 91 citing the full text of section 1113.

104. See supra notes 36-58 and accompanying text for a full discussion of bills of attainder.
ing the opinion of the majority, centered his analysis on whether the statute inflicts legislative punishment. In deciding this critical question, he adopted the three-part test espoused by the Court in *Nixon v. Administrator of General Services.* The three necessary inquiries were: (1) whether the statute inflicts punishment historically associated with bills of attainder; (2) whether the statute can reasonably "be said to further non-punitive legislative purposes;" and (3) whether the legislative history "evidences a congressional intent to punish."

1. An ambiguity on the face of the statute

Before reaching the issue of legislative punishment, the Court considered an ambiguity arising on the face of the statute. Section 1113 requires male applicants to register for the draft "in accordance" with any proclamation issued under the Military Selective Service Act. Additionally, Proclamation No. 4771 requires young men to register for the draft within thirty days of their eighteenth birthday. The district court construed the language of section 1113 as requiring registration within the time fixed by Proclamation No. 4771, thereby precluding late registrants from ever receiving Title IV financial aid. The majority rejected the district court's conclusion, declaring it to be inconsistent with both the structure of section 1113 and its legislative history.

The majority pointed out that the statute itself requires the Secretary of Education to implement regulations providing for notice of a proposed denial of financial aid. The applicant receiving such notice is given no less than thirty days to comply with the registration requirement and to establish his eligibility for receiving the aid. If section 1113 is construed to require registration within the time limit fixed by Proclamation No. 4771, the whole purpose of the notice requirement would be completely undermined, as those not having timely registered would be forever denied financial aid.

106. Id. at 475-76.
110. Selective Serv. Sys., 104 S. Ct. at 3354.
111. Id.
112. See supra notes 20-28 and accompanying text for a full discussion of the implemented regulations.
The majority also found that the district court ignored relevant legislative history in construing the language of the statute. Various legislative remarks were referred to as support for the contention that Congress' motive in implementing section 1113 was to encourage registration. Along with the notice requirement, this legislative purpose would be undermined if the statute was construed in accordance with the thirty day time limit. The court delineated its judicial duty as "not to destroy the Act [if possible] but to construe it, if consistent with the will of Congress, so as to comport with Constitutional limitations." Therefore, the Court found that section 1113 did not make late registrants ineligible for financial assistance.

2. Application of the Nixon three-part test

The majority applied the Nixon three-part test to determine the existence of legislative punishment. The traditional punishments associated with bills of attainder were examined, in compliance with the first Nixon inquiry. As the denial of Title IV financial aid is a mere denial of a contractual governmental benefit, it falls far short of reaching the historical concept of a bill of attainder punishment. Additionally, any non-registrant can become eligible for Title IV aid at any time, simply by registering late.

The Court focused on legislative history to determine whether the statute furthered a non-punitive purpose, in applying the second Nixon inquiry. Statements of various legislators were adopted to encourage registration by disbursing Title IV financial aid only to those who had done so. Additionally, Senator Hayakawa supported the explanation that section 1113 provides for a fair allocation of scarce federal resources.


114. Selective Serv. Sys., 104 S. Ct. at 3355 (quoting CSC v. Letter Carriers, 413 U.S. 548 (1973)).

115. The Court emphasized the escapability aspect of section 1113. Any nonregistrant can, at any time, register late and qualify himself for Title IV aid. Id.

116. See supra notes 47-54 and accompanying text for a discussion of traditional bill of attainder punishment.

117. Selective Serv. Sys., 104 S. Ct. at 3356.


119. Senator Hayakawa stated:
Finally, in applying the third Nixon inquiry, the Court found that certain aspects of the statute negated the existence of a punitive intent. Section 1113 prohibits both innocent and willful nonregistrants from receiving Title IV financial aid. As punitive legislation ordinarily reaches only those who willfully violate the law, Congress must have intended the Act to serve as a valid regulation rather than as a punitive measure. Emphasis was placed on the fact that Congress allowed all nonregistrants to receive financial aid simply by registering late, instead of choosing to inflict punishment for failure to do so within the time prescribed by Proclamation No. 4771.

In short, applying the Nixon analysis, it was concluded that section 1113 was not a bill of attainder. It failed to inflict punishment traditionally associated with bills of attainder, it failed to evidence a legislative intent to punish, and it could reasonably be said to further non-punitive legislative purposes.

B. Side-Stepping Equal Protection and Self-Incrimination

The majority quickly disposed of both the self-incrimination and equal protection issues. The argument that section 1113 compels nonregistrants to acknowledge their failure to register timely in completing the required registration compliance form was rejected. A nonregistrant is under no compulsion to seek financial aid; he is simply ineligible for such aid. Even if a nonregistrant decided to register late, in an effort to comply with the requirements of section 1113, the statement of compliance does not require him to disclose that fact. Therefore, a late registrant is not compelled to disclose any incriminating information in order to be eligible for financial aid.

The more difficult requirement confronting the Court was that an applicant must disclose his failure to register timely when he subsequently registers with the Selective Service. He must complete a
draft registration card which requires him to state his date of birth along with the date of registration.\textsuperscript{125} Nonregistrants argued that this constitutes self-incrimination in violation of the fifth amendment. The Court stated, however, that none of the parties to the action had registered; therefore, none of them had been confronted with the need to assert his fifth amendment privilege in lieu of disclosing his birth date. As the parties before the Court had not, as yet, been denied Title IV aid based on the assertion of their fifth amendment rights, they could not claim that those rights had been violated.\textsuperscript{126}

Not only was the argument that section 1113 violates the right against self-incrimination under the fifth amendment rejected, the argument that the statute violates equal protection under the fifth amendment was also rejected. Nonregistrants argued that section 1113 discriminates on the basis of wealth; however, the Court found that section 1113 denied aid to both poor and wealthy nonregistrants indiscriminately. Furthermore, even if the statute did discriminate based on wealth, it would be constitutional "if rationally related to a legitimate government interest."\textsuperscript{127} The Court concluded that such a rational relationship did exist. Therefore, section 1113 does not violate equal protection under the fifth amendment.\textsuperscript{128}

V. JUSTICE POWELL'S CONCURRENCE

Justice Powell concurred with the majority opinion in part and concurred in the judgment. In so doing, he stated that "the [b]ill of [a]ttainder issue . . . should have been disposed of solely on the ground that [section] . . . 1113 is not punitive legislation."\textsuperscript{129} He rationalized his decision, as did the majority, by stating that section 1113 provided a benefit to eligible students at the taxpayers' expense. Additionally, no individual is compelled to request the benefit, and no identifiable group is singled out to be discriminated against by the government.\textsuperscript{130}

Justice Powell disapproved of the majority's reliance on the interpretation of the language of section 1113 as expressed in the implementing regulations.\textsuperscript{131} The statute is not punitive; therefore, the majority unnecessarily delved into additional arguments to support that decision.\textsuperscript{132}

\textsuperscript{126} Selective Serv. Sys., 104 S. Ct. at 3359.
\textsuperscript{127} Id. at 3359 n.17 (citing Harris v. McKae, 448 U.S. 297, 322-24 (1980)).
\textsuperscript{128} Id. at 3359.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 3360.
\textsuperscript{131} See supra notes 107-12 and accompanying text.
\textsuperscript{132} Selective Serv. Sys., 104 S. Ct. at 3360-61.
VI. JUSTICE MARSHALL'S DISSENT

A. A Violation of Fifth Amendment Self-Incrimination

Justice Marshall agreed with the majority that section 1113 is not a bill of attainder. He did, however, conclude that section 1113 violates the right against self-incrimination under the fifth amendment. He was joined by Justice Brennan in his dissent on this issue.

The basis for Justice Marshall's dissent was not that the Title IV application process compelled a student to reveal incriminating information. Instead, he believed that section 1113 coerced registration with the Selective Service, which, in turn, commanded the individual to disclose incriminating information directly to the government.

He determined that an individual, by registering late, provided to the government crucial information necessary for his prosecution. First, he must state his birth date and registration date. Second, the very act of registering late calls to the government's attention that he is one of the 674,000 men who have violated the Military Selective Service Act.

Justice Marshall further contended that late registration creates a "real and appreciable" risk of prosecution. First, both the registration form and the acknowledgement letter state that any information given by the individual may be sent to the Department of Justice and the Federal Bureau of Investigation upon a suspected violation of the Military Selective Service Act. Additionally, in 1982, President Reagan announced a "grace period," permitting young men to register late without threat of prosecution. Justice Marshall pointed out the implication that, after the expiration of the "grace period," late registrants faced a substantial risk of self-incrimination and prosecution.

Having concluded that late registration is a self-incriminating act, Justice Marshall discussed whether section 1113 operates to coerce self-incrimination through late registration. He began by stating that

133. Justice Marshall acknowledged that the majority correctly decided the bill of attainder issue based on construing the statute to permit late registration. Permitting late registration evidences a congressional intent to encourage compliance with the registration requirement rather than to punish nonregistrants. Id. at 3363.

134. Id. at 3364.


136. Selective Serv. Sys., 104 S. Ct. at 3364.

137. Id.

138. Registration Under the Military Selective Service Act, 18 WEEKLY COMP. PRES. DOC. 8 (Jan. 7, 1982).

the denial of student aid constitutes substantial economic coercion. 140
In today's market, post-secondary education is absolutely necessary for entry into most trades and professions. Thus, a nonregistrant in need of financial aid must either abandon his hopes for obtaining a valuable degree, or register late to qualify for financial aid. This forced decision creates economic coercion. 141

Justice Marshall had difficulty with the majority's contention that individuals must claim their right against self-incrimination before they can assert that right in court. 142 An individual, by exercising his fifth amendment rights in refusing to complete a registration form, is incriminating himself as effectively as if he had filled out the form in its entirety. 143 The basis for this contention is that a late registrant, by exercising his fifth amendment rights rather than supplying the incriminating information, puts the government on notice of his refusal to cooperate; he thereby loses his anonymity. 144 The individual, by exercising his fifth amendment rights, is losing his freedom to withhold his identity from the federal government. 145 Although conceding that the government has a substantial interest in encouraging compliance with the draft registration requirement, Justice Marshall concluded that section 1113 is unconstitutional absent any statutory grant of immunity to those individuals compelled to incriminate themselves. 146

B. A Violation of Equal Protection

Justice Marshall also criticized the majority's treatment of the equal protection issue. He considered section 1113 to be discriminatory based on wealth and saw the majority decision as another example of an indifference to realities of life for the poor. 147 In his view, the equal protection analysis should involve three basic determina-

140. Id. at 3365. See supra notes 69-71 and accompanying text for a discussion of economic coercion.
141. Selective Serv. Sys., 104 S. Ct. at 3365.
142. Id. at 3366.
144. Selective Serv. Sys., 104 S. Ct. at 3368. Justice Marshall cited to Minnesota v. Murphy, 104 S. Ct. 1136, 1147 (1984), to support his contention that any risk of prosecution may be cured by a statutory grant of immunity.
146. The grant of immunity would evidence a congressional intent not to punish nonregistrants but to promote compliance with the registration requirement. See Murphy, 104 S. Ct. at 1147 n.7 ("a state may validly insist on answers to even incriminating questions . . . as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination.").
147. Selective Serv. Sys., 104 S. Ct. at 3368 (quoting Flagg Bros., 436 U.S. at 166 (Brennan, J., dissenting)).
tions: (1) the character of the classification at issue; (2) the importance of the governmental benefits to the class of individuals denied those benefits; and (3) the governmental interest supporting the classification.148

Justice Marshall began by criticizing the majority’s opinion that section 1113 treats all nonregistrants alike. The practical effect of the statute is to discriminate against those in need of financial assistance. The wealthy are not affected by the statute for they are not in need of such assistance. Statistical studies were referred to for support of this contention.149 The result is that the wealthy are not required to file compliance statements with the Selective Service as are the poor. This lack of compulsion is due to the fact that a wealthy individual’s education is unaffected by the existence or nonexistence of financial aid. Therefore, the government is treating nonregistrants unequally based on wealth.150

Justice Marshall further supported his view by emphasizing the importance of an education. Individuals have an extraordinary interest in education as it “provides the basic tools by which [they] might lead economically productive lives to the benefit of us all.”151 Indeed, he believed the interest in education to be fundamental.152

In conclusion, Justice Marshall criticized the majority’s approval of section 1113 based on the contention that it is rationally related to a legitimate governmental objective. Such a relationship does not justify subjecting different classes of individuals to different levels of punishment. Even the House sponsor of the statute recognized an element of discrimination.153 Finally, Justice Marshall re-emphasized

148. Id. (citing Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting)).
150. Selective Serv. Sys., 104 S. Ct. at 3369.
151. Id. (quoting Plyler, 457 U.S. at 221).
152. 104 S. Ct. at 3370. Justice Marshall stated that education bears a fundamental relationship to our most basic constitutional values. Id.

Now, maybe we are discriminating against the poor. And if we are, I guarantee I am going to come back with legislation on this floor tomorrow and the next day and the next day and every day this session with amendments that will prohibit any funds from being used for the Job Training Act if they are not registered, for any unemployment compensation insurance if they are not registered, and for any kind of taxpayers’ money if they are not registered. Id.
that the importance of an education is too basic, and the discrimination inherent in the statute too great, to uphold the constitutionality of section 1113.154

VII. IMPACT

Selective Service System v. Minnesota Public Interest Research Group will undoubtedly have a significant impact on future federal legislation. The decision paves the way for increased governmental intrusion into personal freedom. It indicates that the Supreme Court is willing to give Congress a greater range of power to impose civil penalties on those failing to conform with the law. The decision also indicates that the Supreme Court is swinging toward a narrow, more conservative interpretation of the Constitution.

Section 1113 has an obvious purpose: to promote compliance with the draft registration requirement. This purpose, in and of itself, is legitimate in a strong defense-oriented society such as the United States. However, the means chosen to promote such compliance involves the denial of educational financial aid to those who have failed to register, whether willfully or unintentionally.155 Education seems fundamental in today's society and is completely unrelated to draft registration.

The question then arises: "How far may Congress go in passing legislation restricting governmental benefits based on civil disobedience?" For example, the decision raises the possibility that Congress may limit the availability of Medicaid and other social benefits to those having performed an illegal act or engaged in civil disobedience. Furthermore, those desiring such benefits may be forced to file a written certification denying their involvement in any illegal act. Such legislation will necessarily result in the chipping away of constitutional guarantees which play an essential role in the protection of personal liberty.

Those directly affected by section 1113 are now faced with a dilemma: whether to register late and qualify for Title IV financial aid, thereby subjecting themselves to possible criminal prosecution, or to remain unregistered, thereby denying themselves the opportunity to obtain a valuable education. The impact of section 1113 upon those individuals is severe.

Consider a young man who has failed to register within thirty days of his eighteenth birthday. Suppose further that this young man failed to register due to his moral outrage against the possibility of killing another human being. After Selective Service System, this

A young man has subjected himself to two possible sanctions. First, the Selective Service Act itself provides for imprisonment and a fine for willful nonregistration. Second, section 1113 prohibits all nonregistrants from receiving Title IV educational financial aid.

The constitutionality of imprisonment and/or a fine for willful nonregistration is not at issue; therefore, the additional sanction imposed by section 1113 seems to be both unnecessary and oppressive. No rational relationship exists between the act (failing to register) and the punishment imposed (denial of educational financial aid). Additionally, there seems to be no legitimate reason for imposing a punishment which will affect only poor or middle class nonregistrants who desire to further their education. Poor, middle class and wealthy nonregistrants have committed the same offense, yet only the poor or middle class will be denied access to funds necessary to complete their educations.

It is true that a nonregistrant simply has to register with the Selective Service to become eligible for financial aid. This, however, overlooks the fact that a late registrant is still subject to prosecution for failing to register within thirty days of his eighteenth birthday, as mandated by the Selective Service Act. As the act of late registration puts the government on notice of the young man’s name, address and birthdate, late registration may increase the possibility of prosecution. Thus, a nonregistrant may forego financial aid, along with his chance to obtain a valuable education, for fear of such prosecution.

In today’s society, post-secondary education is an absolute prerequisite for entrance into most professions and for employment on many levels. Additionally, many students are able to complete their education only through some form of financial assistance. Section 1113 denies middle class and poor nonregistrants the ability to receive the necessary loans or grants essential to their college education. Such a sanction is applied regardless of the scholastic achievements or the potential of an individual desiring to further his education. The result is that the unfortunate victim of section 1113 may be denied a key to the educational gates which could free him from an existence in poverty and ignorance.

VIII. CONCLUSION

Post-secondary education, as an American opportunity, is essential
in modern society. Indeed, Justice Marshall considers education to be fundamental to our basic constitutional values. Legislation effectively denying an individual access to financial aid necessary to further his education, should therefore be closely scrutinized.

The decision in Selective Service System, however, seems to have been based on a superficial reading of section 1113, rather than on a practical look at the effect of the statute. The decision implies that if a law seems to be constitutional on its face, the effect of that law is of little significance. The Court, in an effort to coerce compliance with the draft registration requirement, overlooked encroachments on the fifth amendment guarantees of equal protection and the privilege against self-incrimination.

TERESA L. HOWELL

158. Selective Serv. Sys., 104 S. Ct. at 3370. See supra note 152.